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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JIMMY DON EDWARDS,

Defendant and Appellant.

F057895

(Super. Ct. No. F08903306)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Ralph Nunez, Judge.

Carl M. Faller and Lee M. Faller, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, William K. Kim and Amanda D. Cary, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Ardaiz, P.J., Levy, J. and Poochigian, J.

Jimmy Don Edwards was convicted of possessing a handgun and ammunition despite being a felon and receiving stolen property, a car. During trial, his defense was that the driver of the stolen vehicle, a felon named Dwayne Perry, was the actual culprit. He contends that he was denied a fair trial by the trial court's decision to bar evidence that Perry carried similar firearms on two prior occasions. We conclude that the trial court did not abuse its discretion in barring the evidence pursuant to Evidence Code section 1101. Thus, we affirm the judgment in its entirety.

STATEMENT OF THE CASE

On November 3, 2008, the Fresno County District Attorney filed a first amended information charging appellant with possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1); count 1), possession of ammunition (Pen. Code, § 12316, subd. (b)(1); count 2), unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a); count 3), and receiving stolen property, a motor vehicle (Pen. Code, § 496d, subd. (a)). The information further alleged that appellant had a prior "strike" conviction (Pen. Code, § 667, subd. (b)) and had served a prior prison term (Pen. Code, § 667.5, subd. (b)).

That same day, appellant waived formal arraignment on the first amended information, pled not guilty to all counts, and denied all allegations.

On December 19, 2008, the jury found appellant guilty as charged on counts 1, 2, and 4. The jury found appellant not guilty on count 3. The trial court subsequently found to be true the allegations of a prior strike conviction and prison prior.

On June 5, 2009, the trial court sentenced appellant to total of seven years in state prison. Appellant received 577 days total presentence custody credit.

On June 11, 2009, appellant filed a timely notice of appeal.

FACTS

While on patrol on the evening of May 16, 2008, Fresno Police Officer Frederick Williams and his partner noticed a gray car with tinted windows. They pulled behind the

car and had dispatch run a check on the license plate number. Dispatch informed the officers that the vehicle was reported stolen.

The officers requested backup to assist in a traffic stop of the car and they followed the car until it approached a dead end. At that point, they activated their lights and the vehicle pulled over. Appellant was sitting in the front passenger seat and Perry was the driver. The traffic stop occurred directly in front of Perry's residence.

Officer Williams advised appellant of his *Miranda*¹ rights and appellant agreed to talk with the officer. Appellant said he asked Perry to pick him up at his house, and take him to Clovis to work on his car. He said Perry arrived at his house in the stolen vehicle around 2:00 p.m. When they could not get his car working, appellant said Perry drove him back home. On the way back to appellant's house, Perry stopped at an apartment complex and talked to a Hispanic man. Appellant told Officer Williams that Perry told him the car belonged to a woman named Amber and he was going to do some mechanical work on it. He said Perry became nervous when the officers activated their emergency lights and initiated the traffic stop.

Officer Williams then searched the car. He found a .22 caliber semiautomatic handgun wedged between the left side of the passenger seat and the center console, approximately five inches off the floorboard. He also searched the trunk and found a box of live .22-caliber ammunition, along with men's clothing, a red gas can, a drill, and a calendar or day planner. Appellant told Officer Williams he did not know the handgun was in the car and he did not know the car was stolen. Appellant said the clothing, gas can, drill, and day planner belonged to him. Neither appellant nor Perry claimed ownership of the ammunition.

Perry agreed to testify for the prosecution in exchange for the charges against him in the present case being dropped. He admitted that he was on felony probation at the

¹ *Miranda v. Arizona* (1966) 384 U.S. 436.

time of the incident. He testified that appellant had called him around noon on May 16, 2008 and asked him if he could take appellant to pick up a car belonging to one of appellant's friends. When Perry picked appellant up in his white car, appellant told Perry that they needed to pick up the car key and a gas can because the car belonging to appellant's friend did not have gas. Perry drove appellant to an apartment complex where appellant got a car key and a gas can. Then Perry drove appellant to a gas station so he could fill up the gas can.

After appellant got gas, Perry drove him to where the stolen vehicle was located. When they arrived, Perry saw a Hispanic male standing next to the vehicle. Appellant then filled the car's gas tank and Perry followed appellant to Clovis to help appellant remove some stereo equipment from appellant's inoperative vehicle. Afterward, appellant told Perry that he could call him later and Perry drove back home.

Later that afternoon, appellant called Perry to ask him to help appellant move the stereo equipment so that he could sell it in Kerman. Perry agreed, but he wanted to drop his car off at his mother's place because it was low on gas. Appellant and the Hispanic male picked up Perry at Perry's mother's house and they drove in the stolen vehicle to Kerman where appellant gave the stereo equipment to another friend.

The group left Kerman that evening and appellant dropped the Hispanic male off at the male's girlfriend's house. Appellant and Perry then drove to an apartment complex where Perry waited in the car while appellant went into an apartment to speak with another man. From there, they headed back to Perry's car. As they were driving appellant mentioned the car's performance capabilities and Perry asked if he could drive it the rest of the way to his home. Appellant agreed. As Perry drove the car, appellant said that he had connections at the California Department of Motor Vehicles and he could get the car's Vehicle Identification Number changed to make the car "legit." At that point, Perry realized that the car was stolen. The police subsequently pulled the car over.

The owner of the stolen vehicle testified that she did not own a gun, no one ever brought a gun into her car, and she did not have a gun in the car when it was stolen. She also did not know appellant and had not given him or anyone else permission to drive her car on or before May 15, 2008, when she reported the car missing.

Appellant had been living with Tammy Valenzuela in her apartment since August of 2007. Tammy's daughter, Marissa Valenzuela, testified that, on May 16, 2008, appellant had called her brother and asked him for a gas can. Marissa said that she saw appellant pull up to her brother's house in a gray car that was driven by Perry. Marissa had known Perry for about one year and had previously seen him drive a white car. She said they retrieved a gas can from her brother before they left. Appellant was unable to persuade the trial court to allow Marissa to testify that she had previously seen Perry in possession of semiautomatic handguns on two prior occasions.

The parties stipulated that, prior to May 16, 2008, appellant had been convicted of a felony, and as a result was prohibited from owning a firearm.

DISCUSSION

Appellant argues that the trial court erred in barring Marissa from testifying that she had seen Perry in possession of semiautomatic handguns on two prior occasions, although she was not able to identify the handguns Perry possessed on the prior occasions as the .22 handgun found in this case. Appellant contends that this testimony was admissible as impeachment evidence. We disagree.

Prior to trial, the prosecution moved to limit Marissa's testimony pursuant to Evidence Code section 352. The prosecutor sought to exclude testimony regarding Marissa's prior relationship with Perry during which time he allegedly tried to pimp her out, and testimony that Marissa had seen Perry in possession of semiautomatic guns in the past. The prosecutor argued that these facts were collateral issues with minimal, if any, relevance to this case and they would require an undue consumption of time to litigate. Defense counsel conceded the pimping testimony might be more of a collateral

issue, but stated that he intended to question Perry about carrying firearms in the past, and, if Perry denied carrying firearms, he planned to introduce Marissa's testimony as impeachment. The trial court tentatively concluded that the pimping testimony should not be allowed unless there is some relevant connection, but that the firearms testimony may be admissible if Perry testified that he had never possessed a gun.

During trial, the defense cross-examined Perry on the issue of firearms as follows:

"[Defense Counsel]: That .22 caliber pistol belonged to you; correct?"

"[Perry]: No.

"[Defense Counsel]: You had been carrying that pistol for some period of months prior to you being arrested?"

"[Perry]: No.

"[Defense Counsel]: Okay. You have displayed that pistol to other people prior to this incident; correct?"

"[Perry]: No.

[Defense Counsel]: You know a young lady by the name of Marissa Valenzuela?

[Perry]: No.

[Defense Counsel]: Never heard of her?

[Perry]: No.

[Defense Counsel]: Never met her?

[Perry]: No."

Before Marissa testified, the prosecution once again moved to exclude testimony from Marissa referring to pimping or Perry's prior possession of firearms. On the potential firearms testimony, the prosecutor argued that, under Evidence Code section 1101, character evidence is not admissible to support a claim of third party culpability. In response, defense counsel indicated that he would be using Marissa's testimony for impeachment because he had asked Perry, "Isn't it true you carry firearms, sir?" and Perry had answered "No, not at all." Both the court and the prosecutor seemed to agree

that defense counsel had asked that question. Nevertheless, the trial court precluded defense counsel from eliciting the firearms testimony from Marissa because “you can’t impeach every possible [witness] because you want to make [the argument that Perry has been known to carry firearms] to the jury at the end.” The trial court concluded that the evidence of prior possession of handguns was not admissible, possibly in reference to the prosecution’s argument that it was inadmissible under Evidence Code section 1101.

Evidence Code section 787 provides: “Subject to [Evidence Code] Section 788 [the prior felony exception], evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness.” This section, however, does not prevent defense counsel from showing that a witness lied in court about a specific instance of conduct, even on a collateral issue. (*People v. Moses* (1972) 24 Cal.App.3d 384, 398-399.). “However, under [Evidence Code] section 352, the court has substantial discretion to exclude collateral evidence.” (*Id.* at p. 399.) Here, a review of the record shows that that defense counsel never asked Perry whether he carried or possessed firearms in the past. Perry only denied that he owned, carried or displayed the handgun found in the stolen vehicle. Thus, Marissa’s testimony that Perry had carried firearms in the past was not admissible because it had no relevance to Perry’s trial testimony. It could not be used to show that Perry lied on this point. Nevertheless, we note that Marissa was allowed to testify that she has known Perry for about a year before she saw Perry with appellant that night, which, if believed, suggests that Perry lied in court when he testified that he did not know Marissa. Thus, defense counsel was able to use Marissa’s testimony to attack Perry’s credibility.

Given that Marissa’s testimony on Perry’s past possession of firearms could not be used to impeach his trial testimony, the only other possibly relevant and admissible purpose for the testimony is character evidence to raise reasonable doubt that Perry was the actual culprit. However, Marissa’s testimony was not admissible for this purpose in this case.

Evidence Code section 1101 provides, in relevant part: “(a) Except as provided..., evidence of a person’s character or a trait of his or her character ... is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity ...) other than his or her disposition to commit such an act.”

In *People v. Davis* (1995) 10 Cal.4th 463, (*Davis*), the California Supreme Court addressed the interaction of Evidence Code section 1101 with third party culpability evidence. The Court explained that “under [*People v. Hall* (1986) 41 Cal.3d 826 (*Hall*)], evidence linking a third person to the actual perpetration of the crime should be treated like any other evidence. [Citation.]” (*Davis, supra*, 10 Cal.4th at p. 501.) However, “*Hall* did not abrogate Evidence Code section 1101 as applied to such evidence.” (*Ibid.*) The Court held that the proffered evidence, in a murder case, may properly be excluded under Evidence Code section 1101 if “it was offered not to show a fact other than the third party’s criminal disposition, such as motive or intent, but merely to show that the third party was the more likely perpetrator because he had a history of violence. [Citation.] Such evidence does not amount to direct or circumstantial evidence linking the third person to the actual perpetration of the crime.” (*Ibid.*) Thus, character evidence is not admissible to support a claim of third party culpability unless the evidence is relevant to prove some fact other than the witness’s character.

Here, Marissa’s testimony could not connect the handgun in this case with any prior handgun carried by Perry. Thus, the testimony cannot show direct or circumstantial evidence linking Perry to the crime of illegally possessing the handgun at issue. The testimony also could not show a fact such as Perry’s motive or intent. Thus, it was not admissible character evidence.

Therefore, the trial court did not err in precluding Marissa from testifying about Perry's prior gun possession.

DISPOSITION

The judgment is affirmed.